No. 82-1753

IN THE

Supreme Court of the United States

October Term, 1982

HUSTLER MAGAZINE, INC., a corporation and CHIC MAGAZINE, INC., a corporation,

Petitioners,

vs.

EASTMAN KODAK COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN R. McDONOUGH,
Counsel of Record,
J. STEVEN GREENFELD,
BALL, HUNT, HART, BROWN AND BAERWITZ,
450 North Roxbury Drive,
Fifth Floor,
Beverly Hills, Calif. 90210,
(213) 278-1960,
Attorneys for Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Statement in Compliance With Rule 28.1.

The following is a list of subsidiaries and affiliates of Respondent Eastman Kodak Company other than companies whose stock is wholly owned by Eastman Kodak Company and/or its officers, or wholly owned subsidiaries and affiliates:

United Photofinishers Limited
E.F. Dowty Limited
The London Pharmacists' D. & P. Service Limited
McInnes & Walton Limited
Miller Bros. Hall & Company Limited
Photo Finishers (Glasgow) Limited
Reflex Photo Works Limited
The Roll Film Company Limited
Stuart Photo Services Limited
Taylors Developing & Printing Works Limited
G. & E. Thompson Limited
United Photographers Limited
University Photo Works Limited

Questions Presented for Review.

1. Whether the courts below correctly concluded that the district court lacked jurisdiction to adjudicate petitioners' second and third claims for relief because the policies and practices of respondent of which petitioners complain constitute private corporate action rather than "governmental action" within the meaning of the First Amendment to the United States Constitution, or "state action" within the meaning of the Fourteenth Amendment to the United States Constitution, or action "under color of state law" within the meaning of 42 U.S.C. §1983.

2. Whether the courts below correctly concluded that the district court lacked jurisdiction to adjudicate petitioners' fourth claim for declaratory relief as to the constitutionality of certain federal and state obscenity statutes because that claim lacks the concrete adverseness necessary to constitute a justiciable controversy within the meaning of Article III of the United States Constitution and the Federal Declaratory Judgment Act, Title 28 U.S.C. §2201.

3. Whether, if the district court had jurisdiction of petitioners' second, third and fourth claims for relief, the petition for certiorari should be denied because petitioners' claims are manifestly without substantive merit.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Page

Constitution

Rule

Statutes

No. 82-1753

IN THE

Supreme Court of the United States

October Term, 1982

HUSTLER MAGAZINE, INC., a corporation and CHIC MAGAZINE, INC., a corporation,

Petitioners,

vs.

EASTMAN KODAK COMPANY, a corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE.

A. Proceedings Below.

Petitioners, publishers of Hustler and Chic Magazines, commenced this action against respondent Eastman Kodak Company ("Kodak") on February 13, 1980, by filing a complaint in the district court below seeking injunctive relief, damages and a declaratory judgment.[1] (EX 1-11.)[2] Petitioners alleged that, as ap-

[1]On February 13, 1980 petitioners also filed action No. C313377 in the Superior Court of the State of California for the County of Los Angeles against Kodak and "Doe" defendants, seeking injunctive and declaratory relief under California law similar to the relief sought in the instant action. Kodak answered the complaint in the state court action. That case is presently at issue but has not been prosecuted by petitioners.

[2]Items of the clerk's record will be cited to herein by parenthetical reference to page numbers of the excerpts contained in Appendix B prepared and filed by the petitioners, followed where appropriate by internal line numbers (*e.g.*, "(EX 19: 25-28)"). References to the Petition for Writ of Certiorari will be made herein by parenthetical reference to its page numbers (*e.g.*, "(Pet. 15)").

plied to petitioners, respondent Kodak's policy and practice of refusing to return to its customers certain film depicting genitals or sexual conduct and pictures developed therefrom (hereinafter referred to, collectively, as "sexually explicit pictures") violates the federal antitrust laws (first claim for relief), deprives petitioners of their right to freedom of speech in violation of 42 U.S.C. §1983 (second claim for relief), and deprives petitioners of rights protected by the First and Fourteenth Amendments (third claim for relief). Petitioners also alleged that they are entitled to a declaratory judgment against respondent Kodak that certain state and federal obscenity statutes are unconstitutional as applied to transactions between petitioners and Kodak (fourth claim for relief). On June 9, 1980, Kodak moved for summary judgment on the grounds that the case presents no genuine issue of material fact and that Kodak was entitled to judgment as a matter of law, supporting its motion by affidavits. Petitioners opposed the motion, filing affidavits in support of their opposition.

On September 22, 1980, the district court, after hearing, granted Kodak's motion for summary judgment as to petitioners' second, third and fourth claims for relief on the ground that none of them presented a claim within its subject matter jurisdiction. The Court dismissed petitioners' first claim for failure to state a claim upon which relief can be granted, with leave to amend within ten days. (EX 360-403.) Petitioners failed to file an amended complaint as to the first claim for relief and on November 14, 1980, final judgment was entered in favor of Kodak. (EX 412-14.)[3]

Petitioners appealed the district court's judgment to the Court of Appeals for the Ninth Judicial Circuit. After the case was briefed and argued, the Court of Appeals affirmed the judgment of the district court by issuance of the following Order, filed on September 16, 1982:

> We affirm the grant of summary judgment for the reasons announced by the district court.

Petitioners filed a petition for rehearing and suggestion for rehearing en banc in the Court of Appeals. The petition for rehearing

---

[3]The petition for writ of certiorari does not challenge the disposition by the courts below of petitioners' first claim for relief.

was denied and the suggestion for rehearing en banc rejected by an order of a majority of the panel, filed on November 15, 1982, wherein it is stated that no judge of the court had requested a vote of the court on the suggestion for rehearing en banc.

B. Statement of Relevant Facts.

The facts relevant to this petition for certiorari, as shown by the parties' pleadings and the affidavits they have filed, are undisputed. Petitioners, publishers of magazines which include sexually explicit material, are subsidiaries of Larry Flynt Publications, Inc. (EX 384: 3-12; 272: 10-12.) Respondent Kodak is a private corporation which markets various kinds of photographic film, operates ten film processing laboratories nationwide dealing with the general public, and provides processing chemicals and technical assistance to non-Kodak film processing laboratories. (EX 112-25.)

In mid-1978, Kodak concluded that Kodak and/or its employees risk criminal prosecution if they knowingly deliver or mail to customers sexually explicit pictures the mailing or delivery of which by any person is prohibited by constitutionally valid federal and state obscenity statutes. Kodak determined that the controlling decision respecting the constitutionality of obscenity statutes is *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), wherein this Court stated that distribution of patently offensive representations or descriptions of the following subject matter may be prohibited by state and federal obscenity laws without violating the free speech guarantees of the United States Constitution: (a) ultimate sexual acts, normal or perverted, actual or simulated and (b) masturbation, excretory functions, and lewd exhibition of genitals. 413 U.S. at 25.[4]

Kodak further determined that federal obscenity laws and state obscenity statutes in those states in which Kodak operates film processing laboratories prohibit the mailing and distribution of the types of pictures that fall within the *Miller* guidelines and had been held constitutionally valid as so applied. (EX 101-02.)

---

[4]These criteria stated in *Miller* are referred to herein as "the *Miller* guidelines".

Based on these determinations, Kodak adopted the business policy of not returning to customers sexually explicit pictures discovered during the routine processing of customer orders which depict subject matter that falls within the *Miller* guidelines. Kodak's policy was formulated unilaterally and was adopted solely to avoid the risk of injury and expense that would result if Kodak or its employees or both were accused or convicted of violating constitutionally valid state and federal obscenity laws. Kodak's policy was *not* formulated (a) at the request of, in cooperation with or with the knowledge of law enforcement authorities or (b) with any intent or purpose on the part of Kodak of participating in the enforcement of obscenity laws, of engaging in censorship, or of suppressing the publication or distribution by other persons, including petitioners, of sexually explicit film, pictures or magazines. (EX 103-05.)

Kodak's formulated policy was reduced to a written notice to customers reading as follows:

> NOTICE
>
> Because of Federal and State laws relating to pornography, Eastman Kodak does not wish to handle pictures that show sexually explicit conduct. Our Legal Department has informed us that processing pictures for customers depicting the following subject matter may subject Kodak to potential criminal prosecution:
>
> (a) Ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Masturbation, excretory functions or lewd exhibitions of genitals.
>
> *Film sent to Kodak for processing which depicts such subject matter will not be returned because of the potential legal problems mentioned above.*
>
> (EX 106; emphasis added.)[5]

Kodak's film processing laboratories gave copies of this notice to customers in the latter part of 1978 and the first part of 1979.

---

[5]The subject matter depicted on film submitted to Kodak for processing can be ascertained only after that film has been developed. Accordingly, to implement its policy Kodak must rely on such advance notice and, in the event the notice goes unheeded, on its refusal to return to customers sexually explicit pictures to which the notice applies.

(EX 104: 1-5.) On December 8, 1978, a copy of the notice was given by Kodak's Hollywood, California film processing laboratory to Robert DeMarco, who represented himself as the Photo Director of Hustler Magazine. Mr. DeMarco read the notice at that time and told Kodak's representative that he would inform Larry Flynt as to Kodak's policy. (EX 109: 13-25.) Mr. DeMarco does not deny receiving such notice.

Petitioners alleged in their complaint that from February 13, 1979 through February 13, 1980, Kodak refused to return a number of pictures developed from film which petitioners transmitted to Kodak's processing laboratories for development. (EX 3: 19-22.) In this Court, as in the courts below, Kodak accepts petitioners' assertion that sexually explicit pictures withheld by Kodak's film processing laboratories during the relevant time period, although submitted under the names of individual photographers, are owned by petitioners. (EX 366: 9-10.)

Two factual matters deserve special emphasis. *First*, petitioners seek to make it appear that Kodak withholds sexually explicit pictures from petitioners for the purpose of preventing petitioners from publishing them in their magazines; petitioners characterize such alleged withholding as a "prior restraint" on their publishing activity forbidden by the First Amendment. The record not only does not support these assertions — it belies them. Kodak withholds sexually explicit films and pictures from *all* customers, not just publishers. Kodak does *not* do so to prevent the customers from using the pictures either to gratify themselves or to display to others, but only to protect Kodak and its employees from criminal charges and prosecution *based on the very act of mailing or otherwise delivering the film and pictures to Kodak's customers*.[6] Kodak does *not* seek to play the censor but only to avoid violation of the law.

---

[6]18 U.S.C. §§1461, 1462 and 1465 prohibit any person from knowingly mailing or transporting in interstate commerce any "obscene, lewd, lascivious, or filthy" material and impose criminal sanctions upon violators.

California Penal Code §311.2(a) provides, in relevant part:

> Every person who knowingly sends or causes to be sent, . . ., or in this state possesses, prepares, publishes or prints, with intent

(footnote continued on following page)

Second, if Kodak and/or its employees were prosecuted for returning sexually explicit pictures to petitioners in violation of an obscenity law, *all that would be before the trier of fact would be the pictures themselves, unedited and without ameliorating context*. It would be no defense in such a criminal prosecution to show that if the pictures had been returned by Kodak to these petitioners, they might not have used the pictures in their magazines, or that before publication petitioners might have modified those parts of the pictures that violate the *Miller* guidelines, or that the issues of Hustler and Chic Magazines in which the pictures appeared might have contained sufficient material of redeeming social value to cause the magazines, taken as a whole, to be protected by the First Amendment. In short, insofar as petitioners' publications are concerned, Kodak deals only with raw material, not the finished product.

SUMMARY OF ARGUMENT.

Petitioners' unconditional submission of film to Kodak for processing, with advance notice of Kodak's policy of refusing to return to customers certain sexually explicit pictures, bars all of petitioners' claims for relief.

None of the petitioners' alleged claims for relief falls within the subject matter jurisdiction of the federal courts. Kodak's policy and practice of refusing to return sexually explicit pictures to petitioners, unilaterally formulated in order to avoid violating constitutionally valid federal and state obscenity statutes, constitutes private action, not "governmental action" within the meaning of the First Amendment, or "state action" within the meaning of the Fourteenth Amendment, or action "under color of state law" within the meaning of 42 U.S.C. §1983.

The district court did not have subject matter jurisdiction with respect to petitioners' fourth claim for relief, which seeks a declaration that certain federal and state obscenity statutes may not

---

to distribute or to exhibit to others, or who offers to distribute, distributes or exhibits to others, any obscene matter is guilty of a misdemeanor.

These statutes which Kodak seeks to avoid violating have been held to pass constitutional muster under the *Miller* guidelines. *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974) (re 18 U.S.C. §1461); *Bloom v. Municipal Court*, 16 Cal.3d 71, 127 Cal.Rptr. 317, 545 P.2d 229 (1976) (re California Penal Code, §§311 and 311.2).

constitutionally be applied to allegedly inhibit the petitioners' publishing activities. Kodak has no interest in defending against that claim or upholding the challenged statutes. Petitioners' claim therefore lacked the concrete adverseness necessary to create a justiciable case or controversy within the meaning of Article III of the United States Constitution and 28 U.S.C. §2201.

Assuming, arguendo, that any of petitioners' claims falls within the subject matter jurisdiction of the federal courts, the petition for writ of certiorari should be denied because none of petitioners' claims has substantive merit. Magazine publishers do not have greater rights than other citizens to use the facilities of private film developers to have sexually explicit pictures processed and returned because the pictures are to be used or considered for use in their publications.

ARGUMENT.

I.

PETITIONERS ARE BOUND BY THE LIMITATIONS STATED IN KODAK'S NOTICE TO CUSTOMERS.

Kodak's notice to customers, which was given to petitioners' representative DeMarco, states in relevant part the terms upon which Kodak is willing to accept film for processing and return to customers. Such terms constitute a part of the contract which defines the legal relationship between Kodak and its customers and the rights and obligations of Kodak thereunder. Pursuant to such contract, Kodak has reserved the right not to return to customers, including petitioners, pictures which depict the kind of sexually explicit conduct described in Kodak's customer notice. By submitting film to Kodak with knowledge of the terms and limitations of Kodak's offer to process and return pictures to customers, petitioners accepted and became bound by those terms and limitations.

When an offer to render a service on conditions is made, an acceptance of the service constitutes an acceptance of the conditions as well. *Massachusetts Mutual Life Insurance Co. v. George & Co.*, 148 F.2d 42, 46 (8th Cir. 1945). Similarly, the receipt and acceptance by one party to a contract of a writing from the other party purporting to state the terms and conditions of the contract binds both parties. *Bernard v. Walkup*, 272 Cal.App.2d 595, 602, 77 Cal.Rptr. 544 (1969).

Petitioners contend that they did not subjectively agree to the terms of Kodak's notice or intend to waive any right or claim against Kodak for the return of their pictures. (EX 299: 6-10.) However, there is no evidence that petitioners expressed any reservation or objection to Kodak's policy when their pictures were submitted to Kodak for processing. Accordingly, they are bound by the terms of Kodak's notice. It is axiomatic that the existence of mutual assent to a contract is determined by objective rather than subjective criteria, relying upon the words and conduct of the parties to determine the existence and terms of their contract. *Meyer v. Benko*, 55 Cal.App.3d 937, 942-43, 127 Cal.Rptr. 846 (1976). Petitioners' unconditional submission of film to Kodak for processing, with advance notice of Kodak's policy, con-

stituted petitioners' acceptance of the conditions and limitations of Kodak's offer and the formation of a contract on those terms. That contract bars all of petitioners' claims for relief in this action.[7]

II.

THE DISTRICT COURT LACKED JURISDICTION TO ADJUDICATE PETITIONERS' THIRD CLAIM FOR RELIEF BECAUSE PETITIONERS HAVE NO RIGHT OF ACTION AGAINST KODAK BASED ON EITHER THE FIRST AMENDMENT OR THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Petitioners Have No Right of Action Against Kodak Based on the First Amendment to the United States Constitution.

Drawing a parallel to the "state action" decisions of this Court which are discussed below, petitioners argue, in effect, that where a citizen's rights protected by the First Amendment are violated by the conduct of a private corporation which is compelled by or otherwise attributable to the laws or policies of the Federal Government, the citizen has a right of action in federal court against the corporation to restrain such conduct and recover damages for injuries which the conduct has allegedly inflicted. For purposes of discussion herein, we refer to such conduct as "governmental action".

Assuming the validity of their contention that such a federal right of action exists, petitioners argue that the interrelationship between the Federal Government and Kodak's alleged deprivation

---

[7]The courts below did not rely upon this contractual defense. However, in an almost identical lawsuit brought by another magazine publisher, the New Jersey state courts granted judgment in favor of Kodak on this basis. *Penthouse International, Ltd. v. Eastman Kodak Co.*, 79 N.J.Super. 155 (Ch.Div. 1980), *affd. per curiam*, No. A-3110-80-T2 (App.Div. April 2, 1982). If this Court should find unpersuasive the reasons given by the district court for granting summary judgment against petitioners, the judgment is nevertheless correct on the basis of Kodak's contractual defense and was entitled to affirmance by the Court of Appeals on that ground. *Helvering v. Gowran*, 302 U.S. 238, 245, 58 S.Ct. 154, 82 L.Ed. 224 (1937); *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 452 (9th Cir. 1980). Accordingly, there is no reason to grant the petition for writ of certiorari.

of petitioners' First Amendment rights necessary to give petitioners such a right of action is established in this case in two ways: (1) Kodak allegedly holds patents and trademarks issued by the Federal Government and (2) Kodak's policy and practice of refusing to return sexually explicit pictures to petitioners is based in part on Kodak's desire to comply with federal obscenity statutes. Neither contention is valid.

1. The Courts Below Correctly Held That the Grant of Federal Patent and Trademark Rights Does Not Make the Conduct of the Grantee "Governmental Action".

Petitioners appear to contend that because Kodak allegedly holds federal patents and trademarks, Kodak's day-to-day business activities constitute "governmental action". If petitioners were correct, *every act* of any holder of a patent or trademark would constitute "governmental action". While there are no cases squarely on point, the courts below correctly rejected this bizzare contention in the light of decisions of this Court and other courts in analogous cases which rejected claims that "state action" existed because a state had in some fashion authorized a corporation to exist or to engage in particular activity. (EX 389: 17-20.)

The grant of a corporate charter does not make the corporation's business policies and practices "state action". *Greenya v. George Washington University*, 512 F.2d 556, 560 (D.C. Cir.), *cert. denied*, 423 U.S. 995, 96 S.Ct. 422, 46 L.Ed.2d 369 (1975). Similarly, the grant of a liquor license to a private club does not make the racially discriminatory policies of that club "state action" under the Fourteenth Amendment. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). Nor does the fact that private entities conduct business pursuant to state licenses or permits make their activities "state action". *Fulton v. Hecht*, 545 F.2d 540 (5th Cir.), *cert. denied*, 430 U.S. 984, 97 S.Ct. 1682, 52 L.Ed.2d 379 (1977) (state licensing and regulation of greyhound race track did not make licensee's acts state action within 42 U.S.C. §1983); *Gemini Enterprises, Inc. v. WFMY Television Corp.*, 470 F.Supp. 559 (N.D.N.C. 1979) (action by state-licensed broadcaster denying media access to an astrological forecasting service did not con-

stitute state action within 42 U.S.C. §1983); *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140 (N.D.Ala. 1971), *affd.*, 456 F.2d 1294 (5th Cir. 1972), *cert. denied*, 410 U.S. 946, 93 S.Ct. 1352, 35 L.Ed.2d 613 (1973) (discharge of industrial waste pursuant to state-issued permit did not constitute state action within 42 U.S.C. §1983); *cf. Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973) (plurality opinion: action of broadcast licensee in not accepting editorial advertisements did not constitute sufficient "governmental action" to give rise to a private right of action under the First Amendment).

Petitioners allege that Kodak's product has a "unique superiority" which is the result of its ownership of numerous patents and trademarks. (Pet. 45.) This conclusory allegation, if true, would not satisfy the "governmental action" requirement. This Court has held that the claim that a state allegedly conferred monopoly status upon a defendant is not determinative in considering whether or not that defendant's termination of electrical service was "state action" within the Fourteenth Amendment. *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 351-52, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *accord, Taylor v. St. Vincent's Hospital*, 523 F.2d 75, 77-78 (9th Cir. 1975), *cert. denied*, 424 U.S. 948, 96 S.Ct. 1420, 47 L.Ed.2d 355 (1976).

Petitioners have cited no case and Kodak has found none deciding the precise question whether a grant of federal patent or trademark rights is sufficient to make all of the activities of the grantee "governmental action". The analogous cases cited above require a negative conclusion. Moreover, many of those cases dealt with a state's specific and necessary authorization of a private entity to engage in the particular activities of which the plaintiffs complained. That is not true with respect to the alleged grant of federal patent and trademark rights to Kodak. Federal patents and trademarks are not necessary to authorize and do not authorize the transaction of business or development of film by Kodak. Instead, the rights granted merely prevent third parties

from interfering with protected property interests of Kodak.[8] Accordingly, there is *less* official federal governmental involvement in the conduct of Kodak of which petitioners complain than there was in the case cited above in which no "state action" was found within the meaning of the Fourteenth Amendment or 42 U.S.C §1983.

2. The Courts Below Correctly Held That Kodak's Policy and Practice of Complying With Federal Obscenity Statutes Does Not Make Its Refusal to Return Sexually Explicit Pictures to Petitioners "Governmental Action".

We discuss and refute below (in Section II B2 of this Brief) petitioners' contention that Kodak's policy and practice of refusing to return sexually explicit pictures to petitioners constitutes "state action" because they are based in part on Kodak's desire to avoid violation of California's obscenity statute, California Penal Code, §311. The same arguments apply to petitioners' contention that Kodak's policy and practice constitute "governmental action" because they are based in part on Kodak's desire to avoid violation of Federal obscenity statutes. Accordingly, we incorporate by reference here our refutation below of the contention that Kodak's compliance with California's obscenity statute makes its challenged policy and practice "state action".

B. Petitioners Have No Right of Action Against Kodak Based on the Fourteenth Amendment to the United States Constitution.

The Fourteenth Amendment does not apply to conduct which falls wholly within the private sector. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 721-22, 81 S.Ct. 856, 6 L.Ed.2d

---

[8]Petitioners cite *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964) and *Griffith Rubber Mills v. Hoffer*, 313 F.2d 1 (9th Cir. 1963), for the proposition that patent and trademark rights are issued not for private benefit but for the public good. (Pet. 48.) However, neither of these cases advance petitioners' argument. Both note that the issuance of a patent is the grant of a statutory monopoly which gives the patent holder the right to exclude others from the unauthorized use of his invention for a limited period of years. Patent grants benefit the general public only in the sense that the patent holder must publicly disclose his invention to get his patent and that, upon expiration of the patent, the invention enters the public domain and may be used freely by anyone.

45 (1961). Consequently, where action taken is by a private individual or corporation without significant official state involvement the Fourteenth Amendment imposes no limitation upon such conduct, and persons allegedly injured by such conduct have no right of action under the Fourteenth Amendment. *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

It is true, of course, that situations have arisen where state law or policy and the conduct of private corporations or individuals were so intertwined that the activities of the latter were held by this Court to constitute "state action" which brought their conduct within the reach of the Fourteenth Amendment. As this Court has said, in determining whether there has been sufficient state governmental involvement with the conduct of a private person or corporation to make the latter's policies and practice "state action", a court's "inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Company, supra*, 419 U.S. at 351 (citations omitted).

In an attempt to establish a right of action against respondent under the Fourteenth Amendment, petitioners contend that the requisite element of "state action" is established in that (1) Kodak allegedly holds trademarks issued by California, (2) Kodak's policy and practice were adopted, in part, to avoid violation of California's obscenity statute and (3) Kodak is allegedly performing the "public function" of censorship. All of these contentions are wrong.

1. The Courts Below Correctly Held That the Grant of State Trademark Rights Does Not Make the Conduct of the Grantee "State Action".

Petitioners' contention that Kodak's day-to-day business activities constitute "state action" because Kodak allegedly holds trademarks issued by California is parallel in substance to their argument (discussion above in Section II A1 of this Brief) that Kodak's activities constitute "governmental action" because

Kodak allegedly holds federal patents and trademarks. Accordingly, we incorporate by reference here our discussion and refutation above of this contention.

2. The Courts Below Correctly Concluded That Kodak Does Not Act "Under Compulsion of Law" Within the Meaning of the Fourteenth Amendment.

Petitioners argue that Kodak's taking of steps designed to avoid prosecution under California's constitutionally valid obscenity statute makes Kodak's policy and practice "state action". This contention should be rejected.

The evidence is uncontroverted that Kodak acted *unilaterally* in adopting its challenged policy and *not* in concert or collaboration with, or at the request or instigation of, any state (or federal) law enforcement official. Nor did Kodak act to further the social policies reflected in the obscenity laws, or as a "volunteer policeman" to see that those laws are enforced against petitioners or anyone else. Kodak adopted its policy only to protect its own interest — solely because Kodak fears that returning the sexually explicit pictures it withholds would subject Kodak and/or its employees to the risk of being criminally prosecuted for violating constitutionally valid state (and federal) obscenity laws. In adopting the challenged policy Kodak's officers acted solely as business executives, *not* as either adjunct government officials or censors. (EX 100-05.)

Nevertheless, petitioners contend that the requirement of governmental involvement sufficient to constitute "state action" is satisfied because Kodak allegedly acted "under compulsion" of California's obscenity statute. (Pet. 29-40.) Petitioners base their argument on three decisions of this Court which applied a less restrictive jurisdictional requirement respecting "state action" in a limited number of special cases involving charges of racial discrimination. *See Adickes v. S.H. Kress and Company*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Robinson v. State of Florida*, 378 U.S. 153, 84 S.Ct. 1693, 12 L.Ed.2d 771 (1964); and *Peterson v. City of Greenville, South Carolina*, 373 U.S. 244, 83 S.Ct. 1119, 10 L.Ed.2d 323 (1963). The courts below held these decisions to be inapplicable on the ground that the less exacting "state action" requirement applied by this Court

in those racial discrimination cases does not apply here. (EX 390-91.) Their conclusion should be upheld.

The record clearly shows that Kodak did not adopt and is not implementing its challenged policy by reason of any state (or federal) statutory or other governmental directive that Kodak and other film developing laboratories must refuse to return sexually explicit pictures to their customers. Rather, Kodak has unilaterally chosen to act as it does in order to avoid the risk of prosecution under state (and federal) obscenity laws of general application. Petitioners' attempt to bring Kodak's conduct within the ambit of "state action" must be rejected because, as was said in *Adams v. Southern California First National Bank*, 492 F.2d 324, 331 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006, 95 S.Ct. 325, 42 L.Ed.2d 282 (1974), ". . . subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept."

Furthermore, many Court of Appeals decisions have stated that the less exacting "state action" requirement applied by this Court in the decisions cited by petitioners does not apply outside the context of racial discrimination. *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427, 428 fn. 5 (2d Cir. 1977); *Granfield v. Catholic University of America*, 530 F.2d 1035, 1046 fn. 29 (D.C. Cir.), *cert. denied*, 429 U.S. 821, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976); *Fletcher v. Rhode Island Hospital Trust National Bank*, 496 F.2d 927, 931 (1st Cir.), *cert. denied*, 419 U.S. 1001, 95 S.Ct. 320, 42 L.Ed.2d 277 (1974); *Jackson v. Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974), *cert. denied*, 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975); *Adams v. Southern California First National Bank, supra*, 492 F.2d 324, 333 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006, 95 S.Ct. 325, 42 L.Ed.2d 282 (1974); *see also Scott v. Eversole Mortuary*, 522 F.2d 1110, 1119 (9th Cir. 1975) (Judge Ely concurring in part, dissenting in part). These decisions recognized that the reason for this Court's willingness more readily to find "state action" in the area of racial discrimination is that governmental inaction or neutrality in the face of private discrimination has often been found to constitute affirmative encouragement of such activity. *Schlein v. Milford*

Hospital, Inc., supra, 561 F.2d 427, 428 fn. 5 (2d Cir. 1977).[9]

The decisions of this Court relied upon by petitioners are also distinguishable from the case at bench for another reason: all of them involved refusal of service to customers by places of public accommodation — lunch counters and the like — *i.e.*, establishments having a historical common law duty to serve all in the community. As the district court below found, applying *United States v. Colgate & Co.*, 250 U.S. 300, 319, 39 S.Ct. 465, 63 L.Ed. 987 (1919), Kodak is under no such duty, but is free to deal with whom it chooses. (EX 379:5-20.) A criminal statute which induces a place of public accommodation to practice racial discrimination is one thing for purposes of applying the "state action" doctrine; a criminal statute which induces a private corporation to eschew trafficking in *Miller*-type obscenity is another.[10]

---

[9]Justice Brennan, concurring in part and dissenting in part in *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), stated as follows:

> The state-action doctrine reflects the profound judgment that denials of equal treatment, and particularly denials on account of race or color, are singularly grave when government has or shares responsibility for them. Government is the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct. *Therefore something is uniquely amiss in a society where the government, the authoritative oracle of community values, involves itself in racial discrimination. Accordingly, in the cases that have come before us this Court has condemned significant state involvement in racial discrimination, however subtle and indirect it may have been in whatever form it may have taken.* These decisions represent vigilant fidelity to the constitutional principle that no State shall in any significant way lend its authority to the sordid business of racial discrimination. *Id.*, 398 U.S. at 190-91 (emphasis added; citations omitted).

[10]Furthermore, in each of the decisions relied upon by petitioners, the private party's segregation policy was enforced by use of the state's criminal trespass or vagrancy laws. The private party discriminator was aware that should he choose to discriminate he could call upon the state police power to effectuate his private decision through the imposition of criminal sanctions. Thus, the purposes of the respective state schemes were clearly to foster and encourage racial discrimination and to afford private discriminators a remedy under state criminal law to enforce their decision to discriminate. No such circumstances are present in the instant action regarding Kodak's uniform policy not to return certain sexually explicit pictures to any customers.

Only one decision has applied the "compulsion doctrine" of the racial discrimination cases outside of that context. *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975), held that a private hospital acted under color of state law when it refused to allow its facilities to be used by the plaintiff for an abortion because the hospital feared criminal prosecution if abortions were permitted. The courts below correctly concluded that the *Doe* decision of the Fourth Circuit stands alone. (EX 401: 1-5.)[11] Respondent submits that *Doe* should not be followed in this case.

3. The Courts Below Correctly Held That Kodak's Policy and Practice Does Not Constitute the Exercise of the "Governmental Function" of Censorship.

Petitioners argue that California has by its obscenity statute "delegated" to Kodak the "traditional power and public function of a censor" and that Kodak's refusal to return sexually explicit pictures therefore constitutes "governmental censorship" of petitioners' publishing activity. (Pet. 40-45.)[12] This argument finds no support whatever in the record. In applying its policy and

---

[11]One ground for the decision in *Doe* was that the state action element is satisfied in the case of a private hospital by the receipt of federal funds under the Hill-Burton Act (42 U.S.C. §§291 *et seq.*). This view has been rejected by nearly every Circuit, including the Fourth Circuit. *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023, 1026 (4th Cir. 1982); *Ward v. St. Anthony Hospital*, 476 F.2d 671, 674-75 (10th Cir. 1973); *Taylor v. St. Vincent's Hospital*, 523 F.2d 75, 77 (9th Cir. 1975), *cert. denied*, 424 U.S. 948, 96 S.Ct. 1420, 47 L.Ed.2d 355 (1976); *Briscoe v. Bock*, 540 F.2d 392, 395-96 (8th Cir. 1976); *Musso v. Suriano*, 586 F.2d 59, 62-63 (7th Cir. 1978), *cert. denied*, 440 U.S. 971, 99 S.Ct. 1534, 59 L.Ed.2d 788 (1979); *Jackson v. Norton-Children's Hospitals, Inc.*, 487 F.2d 502, 503 (6th Cir. 1973), *cert. denied*, 416 U.S. 1000, 94 S.Ct. 2413, 40 L.Ed.2d 776 (1974); *Madry v. Sorel*, 558 F.2d 303, 304-05 (5th Cir. 1977), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 791 (1978); *Hodge v. Paoli Memorial Hospital*, 576 F.2d 563, 564 (3d Cir. 1978); *Schlein v. Milford Hospital, Inc.*, 561 F.2d 427, 428 (2d Cir. 1977).

[12]This contention may also be based on the view that federal obscenity statutes delegate the "public function" of censorship to Kodak. If so, Kodak's arguments in the text also apply to this contention.

practice of refusing to return certain sexually explicit pictures, Kodak neither exercises nor purports to exercise governmental powers. Kodak certainly does not act for the purpose of suppressing what petitioners publish; the independent business judgment reflected in Kodak's policy is simply one of trying to avoid the risk of prosecution under valid obscenity laws. Moreover, petitioners are not in fact "censored", *i.e.*, precluded from publishing their magazines because others are ready, willing and able to develop their film. (EX 138: 5-18; 144: 14-28.) Indeed, by their own admission, if not boast, petitioners are currently publishing what is a "present superior product", judged by what they assert to be their most demanding critical and artistic standards. (EX 274: 4.)

In their effort to bring Kodak's policy within the ambit of the "governmental function" subcategory of "state action", petitioners rely on *Marsh v. State of Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), wherein this Court held that the Fourteenth Amendment applied to nominally private activities abridging free speech where Alabama had delegated to a private group the power to perform traditionally public functions in governing a town. In *Marsh*, the Court held that the state could not impose criminal punishment on a member of the Jehovah's Witnesses who distributed religious literature on the premises of a company-owned town contrary to the wishes of the town's management. Of course, the situation of the company town in *Marsh* is totally different and distinguishable from that of Kodak in the instant case. Unlike the manager of the company town in *Marsh*, Kodak does not possess the indicia of a government censor, nor does its challenged practice result in the prevention of petitioners' speech to the audience they seek to reach. Unlike the prevention of speech resulting from the enforcement of the town ordinance in *Marsh*, Kodak's challenged practice does *not* bar petitioners from publishing and distributing their magazines when and where they choose and with whatever content they choose. At most, Kodak's policy prevents Kodak's knowing participation in petitioners' activities.

Furthermore, in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 163, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978), this Court, rejecting a proposed expansion of the "public function" element of the

"state action" concept, concluded as follows:

> . . ., even if we were inclined to extend the sovereign function doctrine outside of its presently carefully confined bounds, *the field of private commercial transactions would be a particularly inappropriate area into which to expand it.*
>
> (Emphasis added.)

This is surely not a case in which to depart from this wise limitation on expansion of the "state action" concept.

C. This Court's Adoption of Petitioners' Contentions That Respondent's Policy and Practice Constitute Both "Governmental Action" and "State Action" Would Be Unfair to Kodak and Others Similarly Situated.

To hold that Kodak's policy constitutes "governmental action" or "state action", or both, would place Kodak in a "Catch-22" dilemma. If Kodak were then to disobey constitutionally valid federal and state obscenity statutes, by returning proscribed sexually explicit pictures to customers, Kodak would risk having to defend itself and its employees against federal and/or state criminal prosecutions.[13] If Kodak were to withhold such pictures to avoid violating obscenity statutes, it would risk the filing of actions like this one. In either event, Kodak would have to incur very substantial legal expense, disruption of normal business activity, and the risk of a costly and punitive outcome through criminal prosecutions and/or civil actions brought against the Company and/or its employees. The courts below recognized that to place Kodak in such a situation — *i.e.*, "in the middle" between petitioners and the law enforcement authorities, the true antagonists in the pornography field — would be nothing short of monstrous. We respectfully submit that the same conclusion should be reached by this Court.

---

[13]A film processing laboratory employee was so convicted in *Gold v. United States*, 378 F.2d 588 (9th Cir. 1967). *Cf. Spillman v. United States*, 413 F.2d 527 (9th Cir.), *cert. denied*, 396 U.S. 930, 90 S.Ct. 265, 24 L.Ed.2d 228 (1969) (conviction under 18 U.S.C. §1461 for mailing undeveloped movie film for processing).

III.

THE DISTRICT COURT LACKED JURISDICTION TO ADJUDICATE PETITIONERS' SECOND CLAIM FOR RELIEF BECAUSE PETITIONERS HAVE NO RIGHT OF ACTION AGAINST RESPONDENT BASED ON 42 U.S.C. §1983.

A. Petitioners Have No Right of Action Against Kodak Under 42 U.S.C. §1983 Based on Kodak's Alleged Holding of Federal Patents and Trademarks or Kodak's Compliance With Federal Obscenity Statutes.

Title 42, §1983 ("§1983") applies only to a person who acts ". . . under color of any statute, ordinance, regulation, custom, or usage of any *State or Territory or the District of Columbia* . . . ." (Emphasis added.) Because the Federal Government is not mentioned in §1983 (except insofar as the District of Columbia is concerned), petitioners clearly do not have any right of action in this case under that statute insofar as petitioners rely upon Kodak's alleged holding of federal patents and trademarks and Kodak's compliance with or action pursuant to federal obscenity statutes.

B. Petitioners Have No Right of Action Against Kodak Under §1983 Based on Kodak's Alleged Holding of California Trademarks or Kodak's Compliance With California's Obscenity Statute.

In determining whether a person has acted ". . . under color of any statute, ordinance, regulation, custom, or usage, of any State" — referred to hereinafter as "under color of state law" — within the meaning of §1983, this Court has applied the same analysis and precedents as it has employed to determine whether such a person's activities would constitute "state action" under the Fourteenth Amendment. *Lugar v. Edmondson Oil Co.*, ___ U.S. ___, 102 S.Ct. 2744, 2750, 72 L.Ed.2d ___ (1982); *United States v. Price*, 383 U.S. 787, 794 fn. 7 (1966). Accordingly, conduct by a private corporation does not give rise to a claim under §1983 unless the same conduct would give rise to a private right of action under the Fourteenth Amendment. *See Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 349, 95 S.Ct. 449, 42 L.Ed.2d 447 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972).

We have demonstrated above (in Section II B of this Brief) that Kodak's policy and practice of refusing to return sexually explicit pictures to petitioners does not constitute "state action". We hereby incorporate that argument by reference here as Kodak's refutation of petitioners' assertion of a claim against Kodak under §1983.

IV.

THE DISTRICT COURT LACKED JURISDICTION TO ADJUDICATE PETITIONERS' FOURTH CLAIM FOR RELIEF BECAUSE IT LACKS THE CONCRETE ADVERSENESS NECESSARY TO CREATE A JUSTICIABLE CONTROVERSY.

Petitioners' fourth claim for relief seeks a declaratory judgment against Kodak that specified federal and state obscenity statutes are unconstitutional to the extent that they may be interpreted as prohibiting a film processing company from returning sexually explicit pictures to customers in those instances where development of the pictures "is merely an interim step in the publishing process of a magazine."[14] (EX 10: 1-6.) Petitioners seek a declaration that the federal and state obscenity statutes are unconstitutional both facially and as so applied because, it is said, they operate as a prior restraint creating an impermissible chilling effect upon petitioners' speech. (EX 10: 1-11.)

Petitioners' fourth claim for relief does not allege a case or controversy within the meaning of Article III of the United States Constitution *because Kodak has no interest in defending against*

---

[14]Petitioners thus appear to assert that because they are magazine publishers, the First Amendment gives them a right of special access to Kodak's facilities to develop their sexually explicit pictures, beyond the rights of members of the general public. This is simply untrue. The Constitution does not require that the media be given special access to sources of information not available to members of the general public. *Pell v. Procunier*, 417 U.S. 817, 834, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) (upholding the constitutionality of a California prison regulation barring members of the news media from conducting face-to-face interviews with preselected inmates). *Cf. Zemel v. Rusk*, 381 U.S. 1, 17, 85 S.Ct. 1271, 14 L.Ed.2d 179 (sustaining the Government's refusal to validate passports for travel to Cuba which restricted the free flow of information about that country — "The right to speak and publish does not carry with it the unrestrained right to gather information.").

this claim or upholding the challenged enactments. This case therefore lacks the concrete adverseness necessary to create a justiciable controversy within the meaning of article III, section 2, clause 1 of the United States Constitution and the Federal Declaratory Judgment Act (28 U.S.C. §2201). (EX 392-94.) The courts below accordingly and correctly held that they did not have federal subject matter jurisdiction to determine the constitutionality of the challenged state and federal obscenity statutes. *Golden v. Zwickler*, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). The standard for finding a justiciable controversy is, of course, no less demanding in a declaratory judgment action than in any other type of federal court action. *Societe de Conditionnement v. Hunter Engineering*, 655 F.2d 938, 942 (9th Cir. 1981); *Western Mining Council v. Watt*, 643 F.2d 618, 623-24 (9th Cir.), *cert. denied*, 454 U.S. 1031, 102 S.Ct. 567, 70 L.Ed.2d 474 (1981).

In the instant case, no representative of California or the federal government is before this Court to assert the constitutional validity of the challenged California and federal obscenity statutes. Kodak does not have a personal stake in the outcome of plaintiffs' declaratory relief claim nor any intention of resisting it. Under these circumstances petitioners' fourth claim for relief does not "assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); *see also League of Women Voters of California v. Federal Communications Commission*, 489 F.Supp. 517, 520 (C.D.Cal. 1980) (no sufficient genuine adversity where defendant FCC did not present any arguments in support of the challenged statute forbidding noncommercial broadcast licensees to editorialize or oppose political candidates).

Petitioners argue that there is no showing that their fourth claim for relief constitutes a "collusive" action between themselves and respondent Kodak. (Pet. 50.) That is true but irrelevant. The district court lacked Article III jurisdiction not because Kodak intends to collude with petitioners in having the challenged federal and state obscenity statutes struck down but because Kodak is a neutral on the issue of their constitutionality and neutrality does

not meet the requirements of Article III jurisdiction.

Petitioners point to the existence of 28 U.S.C. §2403, permitting state or federal government intervention in actions relating to the constitutionality of challenged statutes affecting the public interest, as affording protection against this becoming a "collusive" action. (Pet. 49-52.) However, as the district court correctly concluded (EX 393-94), the existence of §2403 cannot by itself generate an actual case or controversy where none existed between the private litigants. *United States v. Johnson*, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413 (1943); *Ruotolo v. Ruotolo*, 572 F.2d 336 (1st Cir. 1978).

V.

ASSUMING, ARGUENDO, THAT THE DISTRICT COURT HAD JURISDICTION TO ADJUDICATE PETITIONERS' SECOND, THIRD AND FOURTH CLAIMS FOR RELIEF, THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE NONE OF PETITIONERS' CLAIMS HAS SUBSTANTIVE MERIT.

Even if this Court were to decide that Kodak's policy and practice of refusing to return sexually explicit pictures to its customers constitutes "governmental action" or "state action" or action "under color of law", and if the Court were also to conclude that petitioners' fourth claim for relief presents a justiciable controversy, it would not follow that petitioners had stated viable claims for relief in their complaint herein. Those decisions would only mean that the district court had jurisdiction to adjudicate petitioners' second, third and fourth claims for relief. There would then remain the question whether any of those claims has substantive merit, *i.e.*, whether federal and state obscenity statutes, as applied to petitioners through Kodak's policy and practice, are unconstitutional. That question, if reached by this Court, should be answered in the negative.

Kodak withholds from its customers only sexually explicit pictures falling within the *Miller* guidelines the mailing or delivery of which is proscribed by constitutionally valid federal and state obscenity laws. (EX 100-04.) This being the case, Kodak's policy and practice does not deprive petitioners of any rights under the First or Fourteenth Amendments or 42 U.S.C. §1983 so long as *Miller* continues to stand as this Court's authoritative decision

with respect to the constitutionality of state and federal legislation proscribing the dissemination of pornography.

We do not understand petitioners to dispute the foregoing or to contend that the sexually explicit pictures which they claim Kodak is under a duty to return to them do not fall within the *Miller* guidelines. Instead, petitioners appear to contend that because they are engaged in publishing magazines, petitioners have an unqualified constitutional right to have processed and returned *all* film, however obscene, which they submit to Kodak and other film developers and that insofar as federal and state obscenity statutes interfere with this alleged right, those statutes are invalid.[15] To put the matter another way, petitioners contend that because they are publishers they have a constitutional right to have Kodak process and return to them sexually explicit pictures which Kodak is prohibited by otherwise valid obscenity statutes from returning to other members of the public. In effect, petitioners assert that *Miller* must be reconsidered and then qualified by this Court to enunciate a special and preferred position which magazine publishers should have under the First and Fourteenth Amendments to the Constitution and 42 U.S.C. §1983.

As we have earlier pointed out, this Court has heretofore declined to treat the media differently than other members of American society insofar as the rights conferred by the First Amendment are concerned. *Pell v. Procunier*, *supra*, 417 U.S. 817, 834, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974). Kodak respectfully submits that *Pell* was sound and should be followed in this case, if the Court reaches the issue of the substantive merits of petitioners' claims against Kodak.

VI.

THE COURTS BELOW CORRECTLY HELD THAT BECAUSE PETITIONERS FAILED TO COMPLY WITH FEDERAL RULE OF CIVIL PROCEDURE 56(f), THEY CANNOT COMPLAIN THAT THE SUMMARY JUDGMENT MOTION WAS PREMATURE.

Petitioners contend that the district court should not have ruled on Kodak's motion for summary judgment until they had been afforded an opportunity to conduct discovery. (Pet. 54-55.) The

---

[15]See Petition, pp. iii, 12-13, 16-17, 21-26.

district court rejected this contention because petitioners failed to file an affidavit requesting a continuance of the summary judgment motion pursuant to Federal Rule of Civil Procedure 56(f). (EX 378: 4-7; EX 385-88.) It is well established that a party's failure to take advantage of Rule 56(f) prevents him from complaining regarding the timing of summary judgment. *THI-Hawaii, Inc. v. First Commerce Financial Corporation*, 627 F.2d 991, 994 (9th Cir. 1980); *British Airways Board v. The Boeing Company*, 585 F.2d 946, 954 (9th Cir. 1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). Therefore, petitioners cannot now contend that the district court acted prematurely in granting Kodak's motion for summary judgment.

CONCLUSION.

For the reasons and based on the authorities discussed above, the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN R. MCDONOUGH,
Counsel of Record,
J. STEVEN GREENFELD,
BALL, HUNT, HART, BROWN
AND BAERWITZ,
Attorneys for Respondent.